



# Code of Standards of Professional Practice and Ethical Conduct

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June 2016



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## PART I. INTRODUCTION

### A. Background

1. As in many other jurisdictions the legal profession in Kenya is governed under a regulatory framework comprising statutory provisions, various statutory instruments and guidelines issued by the Law Society of Kenya as the regulatory body. This regulatory framework is underpinned by the Advocates Act, Chapter 16 as well as the Law Society of Kenya Act, Chapter 18 of the Laws of Kenya.
2. The regulatory framework also comprises a “Digest of Professional Conduct and Etiquette” issued by the Law Society of Kenya in 2000 but, in the words of the Digest, “it was not an exhaustive treatise” and given that over 15 years have passed since its issue, it is in need of updating to incorporate present day regulatory concerns and trends in the practice of law.
3. Consequently, not only is the regulatory framework far from comprehensive, aspects of it are out of date as the various components have not been revised and updated. It is also not particularly coherent and many of its rules and guidelines lack clarity, a feature which undermines compliance and makes enforcement difficult. Furthermore, the framework does not extend to all aspects of the practice of law. Of particular concern is the fact that it does not address the management and administration of a law practice, client care and the relationship between the legal practitioner and the bodies regulating the practice of law.
4. The Law Society of Kenya (LSK) is the principal regulatory authority over the legal profession. Its functions and powers are set out in sections 4 and 5 of

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the Law Society of Kenya Act provides that the functions and objects of the Society are, *inter alia*, to:

- (a) Ensure that all persons who practice law or provide legal services in Kenya meet the standards of learning, professional competence and professional conduct that are appropriate to the services they provide;
  - (b) Set, maintain and continuously improve the standards of learning, professional competence and professional conduct for the provision of legal services in Kenya;
  - (c) Determine, maintain and enhance the standards of professional practice and ethical conduct and learning for the legal profession in Kenya;
  - (d) Facilitate the realization of a transformed legal profession that is cohesive, accountable, efficient and independent; and
  - (e) Protect and promote the interests of consumers of legal services and the public interest generally, by providing a fair, effective, efficient and transparent procedure for the resolution of complaints against legal practitioners.
5. Section 5 deals with the general powers of the Society and states that the Society shall have the powers to do all things necessary for the proper and effective achievement of its objects and the performance of its functions.
6. Thus, as is the case with other professions locally and abroad, the legal profession is substantially self-regulated. In its Strategic Plan for 2012-2016, LSK recognized the need to formulate a comprehensive code of standards of professional practice and ethical conduct. Building on the existing Digest of Professional Conduct and Etiquette, the revised code would set standards for the legal profession and be the authoritative guide to legal

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practitioners, regulators and the public in determining what is expected of a member of the legal profession and judging professional misconduct.

7. The Council of the Law Society of Kenya has therefore determined the standards to apply to members of the LSK and approved this Code of standards of standards of professional practice and ethical conduct as a principal instrument of self-regulation of members. It articulates principles, sets standards and provides guidance on the standards of professional practice and ethical conduct expected of members of the Society.

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## B. Application of the Code

8. The scope of LSK's regulatory mandate is over its members. Section 7 of the Law Society of Kenya Act defines the categories of members of the Society. This consists of:
  - (a) Any person who has been admitted as an advocate and whose name has been entered into Roll of Advocates kept under section 16 of the Advocates Act (Cap 16);
  - (b) Any person admitted to membership under section 8 of the Act; and
  - (c) Any person elected as an honorary member of the Society under section 9 of the Act.
  
9. The Advocates Act, Chapter 16 defines an advocate to mean any person whose name is duly entered upon the Roll of Advocates. Section 9 which deals with qualification for practicing as an Advocate states that no person shall be qualified to act as an Advocate unless:
  - (a) He has been admitted as an Advocate;
  - (b) His name is for the time being on the Roll; and
  - (c) He has in force a practicing certificate.
  
10. The Advocates Act therefore draws a distinction between persons who are Advocates by virtue of the fact that the person's name has been entered upon the Roll of Advocates and persons who qualify to practice as Advocates, the main distinction being that the latter category are persons who have in force a practicing certificate. The certificate is issued annually and lapses at the end of the calendar year in respect to which it was issued.

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11. This Code of Ethics and Conduct is intended to apply to all members of the Society, in this case all persons who fall within the provisions of section 7 of the Law Society of Kenya Act. Thus the Code is intended to guide practising Advocates, in-house counsel and others who, while not actively engaged in the practice, are members of the Law Society.

### C. Defining “Professional Misconduct”

12. The term “professional misconduct” is a widely used term in the context of the legal profession. Section 60(1) of the Advocates Act Chapter 16 states that “the expression *professional misconduct* includes disgraceful or dishonourable conduct incompatible with the status of an Advocate.” The concept of professional misconduct is wide and the categories of behavior that would be considered as amounting to misconduct not closed.

13. Broadly speaking professional misconduct is conduct in breach of the rules, standards and ethics of the profession. The concept of professional misconduct therefore defines the standard of professional practice and ethical conduct expected of a member of the legal profession. In regard to the legal profession in Kenya the rules and standards governing the behavior of Advocates are found in different texts, including the Advocates Act (which deals with admission and discipline), the rules made under it and standards and guidelines issued by the Law Society.

14. Professional misconduct is to be distinguished from “unsatisfactory professional conduct.” The latter refers to conduct which falls below the standard of conduct or behavior that is expected of a practicing Advocate, particularly when rendering legal services. It is conduct which falls below the standard one may reasonably expect of a practicing Advocate in terms of



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competence or unbecoming behavior (i.e. behavior not becoming of an Advocate but occurring outside of the context of legal practice).

15. Whereas the categories of professional misconduct are not closed there is a need to provide a comprehensive way of deciding what in a particular instance will be treated as “professional misconduct” or unsatisfactory professional conduct. This is the task of the Code which sets out the key standards that govern the conduct of a member of the Society. Guidance on the interpretation of the standards is equally necessary. Such guidance aids in compliance by members of the Society and in enforcement.
16. This Code of Standards of Professional Practice and Ethical Conduct is intended to be the authoritative standard, guide and reference point in construing professional misconduct and unsatisfactory professional conduct. It defines the minimum standards designed to assist the regulatory bodies and the legal practitioner alike in determining whether, in a particular case, the conduct in question falls within or outside of the remit of professional misconduct.
17. The Code however does no more than set minimum benchmarks for professional practice and ethical conduct, the breach of which amounts to misconduct and might attract punishment. It is not the last word on the conduct expected of a member of the Society. In addition to regulating misconduct the role of LSK as the regulatory body is to encourage professionalism in the legal profession.
18. An aspiration to professionalism seeks to encourage within the legal profession conduct that preserves and strengthens the dignity, honour and

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ethics of the profession. Professionalism goes beyond avoidance of misconduct. It extends to matters of good professional practice, etiquette and ethics, the breach of which do not amount to professional misconduct. A member of the Society is expected to aspire to higher standards of professional practice and ethical conduct, going beyond mere avoidance of misconduct. At this higher level the legal professional is to be guided by his/her conscience, ethical beliefs and the overriding principles and values applicable to legal professionals the world over.

19. Typically the rules governing professional conduct are set within the framework of overriding principles, ethics and values which ought to guide and underpin the interpretation and understanding to be accorded to specific rules in specific contexts. The principles apply to members of the LSK when providing legal services and, in certain cases, even when not providing legal services.

#### **D. Effectiveness of the Code**

20. Under Part XI of the Advocates Act, the Code may, pursuant to the provisions of section 55, be enforced against an Advocate by the Society. The Code may also be enforced by the Advocates' Complaints Commission established by section 53 of the Advocates Act. The Chief Justice or a judge of the High Court may also, in exercising disciplinary powers over Advocates under section 56 of the Act, resort to the Code. Its enforcement lies mainly in a finding, by the regulatory bodies, that by failing to comply with the provisions of the Code, an Advocate is guilty of professional misconduct.
21. The Code outlines principles, standards and guidance for members of the Law Society of Kenya. The standards have been benchmarked against international practice and practice in other commonwealth jurisdictions. They

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do not replace but supplement existing obligations under applicable laws and serve as a framework and a guide for decision-making and action in specific contexts.

22. The effectiveness of the Code will depend on the extent of belief in, and adherence to, the principles and values outlined in Part II, the individual legal professional's conscience and integrity; an ethical culture within the legal profession; and robust interpretation and enforcement by the profession's regulatory bodies.

## **E. Arrangement of the Code**

23. The Code comprises this introductory section which gives the background and sets the context; a section on the overriding values and principles of professional conduct which provides the framework within which the provisions of the Code are to be interpreted; a section on the standards and a section which provides guidance on the interpretation of the standards.
24. Whereas the Code aims to provide a comprehensive set of principles, standards and guidance for interpreting the standards circumstances will arise in which the professional does not find adequate guidance within this Code to enable him or her adequately deal with a particular situation or event. Therefore Advocates are advised to seek the guidance of the Law Society when faced with an issue which they do not find a ready answer to within the Code.

## PART II: OVERRIDING VALUES AND PRINCIPLES OF PROFESSIONAL PRACTICE AND ETHICAL CONDUCT

25. The standards of professional conduct and ethics set out in the Code are underpinned by the following ten (10) principles, which are seen universally applicable to the practice of law and ideals that ought to govern the conduct of members of the legal profession worldwide. The principles and values ought to infuse the decisions and actions of any member of the legal profession as well as those of regulatory authorities when construing the actions of its member who is facing a charge of professional misconduct.

<b>OVERRIDING PRINCIPLES</b>	
<b>Issue.</b>	<b>Principle or values</b>
<b>1. Independence</b>	<i>Professional independence is a key ingredient of the Advocate's ability to provide professional services to the client objectively. Professional Independence ought to be nurtured and respected by the professional body, other regulatory authorities, fellow professionals, the client and the Advocate himself/herself. Independence requires that the Advocate is free from undue influence arising from political, financial, career, personal, emotional or other considerations.</i>
<b>2. Honesty and integrity</b>	<i>Honesty and integrity are the hallmark of the legal professional and must be exhibited by every legal professional in all his/her dealings with clients, office staff, fellow professionals, service providers, regulatory and other public authorities and members of the judiciary bench. Honesty and Integrity among members of the profession fosters trust and confidence in the profession and enhances the moral standing and public image of the profession. Honesty and integrity encompasses civility, professional integrity, high personal moral standards, and respect for others among characteristics.</i>
<b>3. Fidelity to the law</b>	<i>The legal professional's first duty is to the law and due process. He/she is an officer of the court and must at all times and in all his dealings show fidelity to the law and demonstrate respect for the rule of law and due process. The legal professional must therefore never subvert or connive in the subversion of the law or due process in his/service of the</i>

<b>OVERRIDING PRINCIPLES</b>	
<b>Issue.</b>	<b>Principle or values</b>
	<i>client's interests.</i>
<b>4. Conflict of interest</b>	<i>Trust and confidence in the legal profession depends upon the legal professional's loyalty to clients. Avoidance of situations of conflict of interest also enhances the legal professional's ability to render unbiased and objective service to the client and enhances the standing of the legal profession in the eyes of the public.</i>
<b>5. Advocate-client confidentiality</b>	<i>The right and duty of the legal professional to keep confidential information received from and advice given to the client is an indispensable feature of the rule of law and essential to public trust and confidence in the administration of justice. It enhances the client's trust in the legal professional and facilitates full and frank communication between the Advocate and the client. Advocate-client confidentiality must be nurtured, respected and protected by regulatory authorities, fellow professionals and the legal professional himself/herself.</i>
<b>6. Professional undertakings</b>	<i>The legal profession is an honourable profession. The old adage that "the lawyer's word is his [her] honour" must be strictly adhered to and given effect by the legal professional in all his/her dealings. Undertakings facilitate legal transactions and without them transactions would be severely hampered. Their effectiveness depends on the integrity of the legal profession. Therefore an undertaking – whether given in writing or orally - is sacrosanct and must be honoured.</i>
<b>7. Fiduciary duty to the client</b>	<i>In his/her handling of the client's funds and other property the legal professional stands in a position of trust. Therefore the legal professional has a fiduciary duty to safeguard client's funds and other property, fully account for them, not use them in a manner that is adverse to the client's interests.</i>
<b>8. Professionalism</b>	<i>The lawyer must demonstrate professionalism in his dealings with the client, with fellow professionals, third parties and the judiciary. Professionalism requires that the lawyer is competent and renders service diligently at all times.</i>
<b>9. Remuneration</b>	<i>As professionals lawyers are entitled to fair reasonable remuneration for services rendered. Reasonable remuneration enhances the ability of the Advocate to render services diligently and promotes financial</i>

<b>OVERRIDING PRINCIPLES</b>	
<b>Issue.</b>	<b>Principle or values</b>
	<i>independence. The lawyers' professional association, the courts and clients have an obligation to facilitate an environment in which legal services can be provided in a framework which enables members of the legal profession to earn reasonable remuneration without legal fees becoming a barrier to access to legal services.</i>
<b>10. The lawyer in society</b>	<i>The lawyer is a member of his/her society and is expected to lead by example. Therefore the lawyer's conduct in society must uphold the dignity and honour of the profession and reflect the best of his/her society's values. In his/her "outside" life as in his/her professional life the lawyer must eschew conduct which undermines the standing of the legal profession.</i>

## PART III: THE STANDARDS OF PROFESSIONAL PRACTICE AND ETHICAL CONDUCT

26. This Part III of the Code provides 12 standards of professional practice and ethical conduct (“SOPPEC”) to govern the practice and conduct of every member of the LSK. A breach of the standards shall constitute professional misconduct punishable by disciplinary action. The Code has not assigned weight to a standard or ascribed gravity to any particular standard, leaving this to be assessed by the disciplinary bodies on a case by case basis. In the absence of a sentencing policy, the Code has also left it to the disciplinary authorities to determine the nature of sentence that would be appropriate to a particular instance of professional misconduct in the circumstances of the case.

Topic	STANDARD OF PROFESSIONAL PRACTICE AND ETHICAL CONDUCT (“SOPPEC”)
<b>SOPPEC-1: Requirement for a practicing certificate</b>	<i>It is professional misconduct for any person who has been admitted as an Advocate to engage in the practice of law without a practicing certificate valid for the practice year or to allow his/her name to be used by persons not qualified to practice law to offer legal services.</i>
<b>SOPPEC-2: Advertising and marketing</b>	<i>Except to the extent permitted by the Advocates (Marketing and Advertising) Rules or any amendment or replacement thereof, it is professional misconduct for an Advocate directly or indirectly to apply or seek instructions for professional business or do or permit in the carrying on of his practice any act or thing which can be reasonably regarded as touting or advertising or as calculated to attract business.</i>
<b>SOPPEC-3: Competence and diligence in client care</b>	<i>The Advocate is under a duty to provide the legal services in respect to which he/she is engaged competently, diligently and ethically. Failure to do so will be dealt with as professional misconduct.</i>
<b>SOPPEC-4: Professional fees</b>	<i>The practice of undercutting, that is, charging less than the scale fees for professional services rendered, constitutes professional misconduct. At the same time, charging unjustifiably high fees, which is not commensurate with</i>

Topic	<b>STANDARD OF PROFESSIONAL PRACTICE AND ETHICAL CONDUCT (“SOPPEC”)</b>
	<i>the professional services rendered, constitutes professional misconduct.</i>
<b>SOPPEC-5: Fiduciary duty over client’s funds and other property</b>	<i>The Advocate shall not appropriate or convert any funds of the client held in trust or otherwise under the Advocate’s control without the express authority of the client. Any unauthorized appropriation or conversion is professional misconduct.</i>
<b>SOPPEC-6: Conflict of interest</b>	<i>The Advocate shall not advise or represent both sides of a dispute and shall not act or continue to act in a matter when there is a conflicting interest, unless he/she makes adequate disclosure to the client(s) and obtains the client’s consent.</i>
<b>SOPPEC-7: Confidentiality and Advocate-client privilege</b>	<i>Communication between the Advocate and client is protected by the rule on confidentiality of Advocate-client communication. The Advocate has a duty to keep confidential the information received from and advice given to the client. Unauthorized disclosure of client confidential information is professional misconduct. At the same time the Advocate has a duty to safeguard against the abuse of Advocate-client confidentiality to perpetrate illegal activity.</i>
<b>SOPPEC-8: Fidelity to the law and due process</b>	<i>The Advocate is an officer of the court and has a duty of fidelity to the law. Therefore the Advocate shall discharge his/her duty to represent the client in adversarial proceedings as well as in non-contentious matters by fair and honourable means and without illegality or subversion of the due processes of the law.</i>
<b>SOPPEC-9: Professional undertakings</b>	<i>The Advocate has a duty to honour any professional undertaking given in the course of his/her practice in a timely manner. The obligation to honour a professional undertaking remains until the undertaking is performed, released or excused. To fail to honour an undertaking is professional misconduct.</i>
<b>SOPPEC-10: Social media</b>	<i>Inappropriate use of social media, particularly in a manner that undermines the standing and dignity of the legal profession, is professional misconduct. Material and content drawn from social media sites may be taken into account by regulatory authorities in dealing with a charge of professional misconduct.</i>
<b>SOPPEC-11: Outside interests</b>	<i>The Advocate who engages in another profession, business or occupation concurrently with the practice of law shall take care not to allow such outside interests to jeopardize his/her professional integrity, independence or</i>



<b>Topic</b>	<b>STANDARD OF PROFESSIONAL PRACTICE AND ETHICAL CONDUCT (“SOPPEC”)</b>
	<i>competence or the standing of the legal profession.</i>
<b><u>SOPPEC-12: Honesty and integrity</u></b>	<i>The Advocate shall at times maintain the highest standards of honesty and integrity towards clients, the court, -colleagues, all with whom the Advocate has professional dealings - and the general public.</i>

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## PART IV: GUIDANCE ON THE INTERPRETATION OF THE STANDARDS

27. This Part IV provides guidance on each standard which comprises an explanatory note which articulates the standard, provides its basis and rationale, and explains its scope and applicability in specific contexts.

### 1. Requirement for a practicing certificate

28. SOPPEC-1: *It is professional misconduct for any person who has been admitted as an Advocate to engage in the practice of law without a practicing certificate valid for the practice year or to allow his/her name to be used by persons not qualified to practice law to offer legal services.*

29. The Advocates Act, Chapter 16 defines an advocate to mean any person whose name is duly entered upon the Roll of Advocates. Section 9 which deals with qualification for practicing as an Advocate states that no person shall be qualified to act as an Advocate unless:

- (a) He has been admitted as an Advocate;
- (b) His name is for the time being on the Roll; and
- (c) He has in force a practicing certificate.

30. Statutory basis for the Standard: SOPPEC–1 which makes it the duty of the Advocate not to practice unless he has in force a valid practicing certificate is underpinned by the following statutory provisions of the Advocates Act:

- (a) Section 31 which prohibits an unqualified person from acting as an Advocate;

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- (b) Section 33 which makes it an offence to pretend to be an Advocate or to take or use any name, title or description implying that the person is an Advocate or is recognized by law as qualified to act as an Advocate;
  - (c) Section 34 which prohibits an unqualified person from preparing certain documents or instruments including relating to conveyancing of property, incorporation of a company, a partnership agreement, probate or letters of administration, or for which fees is prescribed by the Chief Justice.
  - (d) Section 37 which prohibits the sharing of profits with an unqualified person;
  - (e) Section 39 which prohibits an Advocate from acting as an agent for an unqualified person;
  - (f) Section 40 which provides that costs shall not be recoverable where an unqualified person acts as an Advocate; and
  - (g) Section 41 which prohibits employing persons who have been struck off the Roll or suspended without the permission of the Council.
31. Rationale for the Standard: Statutory provisions prohibit the practice of law by unqualified persons. This is due to the fact that whereas an unqualified person may well be capable of advising or representing another in a legal dispute or undertaking conveyancing or corporate work, such a person is not subject to the control of regulatory bodies, including the LSK. In the case of misconduct, an unqualified person, not being a member of the Society, is not subject to disciplinary procedures of the Law Society and the Advocates Complaints Commission.

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32. An additional reason for the prohibition arises from the fact that the client of an Advocate authorized to practice law has the protection and benefit of Advocate-client privilege, the Advocate's duty of secrecy, and the authority that the courts exercise over Advocates. The client also has rights in respect to taxation of bills, rules respecting operation of client accounts and professional indemnity cover, all of which provide the client with rights and protections that assure quality service and recourse in case of professional misconduct.

33. Scope of the Standard: This Standard requires the Advocate to ensure that he/she:

- (a) Has in place a valid practicing certificate;
- (b) Does not lend his name and reputation as an Advocate for use by an unqualified person;
- (c) Takes full responsibility (by, where required, appending his/her signature to a document) for all business in respect to which he has been instructed, even in respect to tasks which he/she has delegated or assigned to legal assistants and other support staff;
- (d) Does not maintain a branch office unless there is posted at that branch office on a full time basis a duly qualified Advocate;
- (e) Does not, without the approval of LSK, employ an Advocate who has been suspended or struck off;
- (f) Reports to the Society instances which come to his/her knowledge of an unqualified person practicing as an Advocate;
- (g) If an in-house counsel employed by an unqualified person, does not draw documents or render legal services to his employer for which

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fees are charged directly or indirectly by his employer and retained by that employer.

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## 2. Advertising and/or marketing

34. SOPPEC–2: *Except to the extent permitted by the Advocates (Marketing and Advertising) Rules or any amendment or replacement thereof, it is professional misconduct for an Advocate directly or indirectly to apply for or seek instructions for professional business or do or permit in the carrying on of his practice any act or thing which can be reasonably regarded as touting or advertising or as calculated to attract business.*
35. Statutory basis for the Standard: SOPPEC–2 prohibits an Advocate from advertising or marketing his/her practice. The statutory basis for the Standard is rule 2 of the Advocates Practice Rules (LN 19/1967, LN 233/1984). The absolute prohibition against advertising and marketing in rule 2 has recently been qualified through the provisions of the Advocates (Marketing and Advertising) Rules, LN No 42/2014 which prescribe the circumstances in which and the manner of permitted advertising and marketing.
36. Rationale for the Standard: It is important that a person requiring legal services is able to access information about the Advocates qualified to offer the kind of legal services the person seeks. Advertisement of legal services by the Advocate may assist members of the public to access appropriate legal services.
37. Scope of the Standard: However, an Advocate should solicit for work by means that are compatible with integrity, independence and the dignity of the profession. Accordingly, an advertisement or marketing by an Advocate shall:

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- (a) Comply with the provisions of the Advocates (Marketing and Advertising) Rules;
  - (b) Not detract from the integrity, independence and dignity of the legal profession;
  - (c) Not mislead uninformed or vulnerable members of the public;
  - (d) Not arouse unattainable hopes and expectations; or
  - (e) Be so undignified or offensive as to be prejudicial to the interests of the legal profession or public interest.

38. It is also the case that, by reason of professional involvement in a dispute or transaction, the Advocate may be able to assist the media in conveying accurate information to the public about the matter in issue. In such circumstances and for that purpose, it would be proper for the Advocate to make a media appearance.

39. The Advocate has a duty to ensure that before making a public statement concerning a client's affairs, the Advocate is satisfied that any communication is in the best interest of the client and within the scope of the Advocate's engagement. Additionally, the Advocate should ensure that his comments are accurate and objective.

40. The Advocate may also make media appearances in a non-legal setting to publicise fundraising activities, promotion of charitable or other public interest causes and so on. The Advocate should always endeavor to uphold the dignity of the profession during such appearances.

41. Whether making a media appearance in the context of a legal brief or in a non-legal setting, the Advocate should take care not to convert the media

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appearance into a marketing opportunity by seeking to encourage publicity for himself in the media reports of the case or transaction contrary to the Advocates (Marketing and Advertising) Rules. The Advocate should take care that the appearance and comments he/she makes do not infringe on the Advocate's obligations to the client, the profession or the courts.



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### 3. Competence and diligence in handling of a client's brief:

42. SOPPEC-3: *An Advocate is under a duty to provide the legal services in respect to which he/she is engaged competently, diligently and ethically. Failure to do so will be dealt with as professional misconduct.*
43. The Standard on competence comprises several elements:
- (a) qualification to be admitted as an Advocate;
  - (b) qualification to practice law;
  - (c) possession of the knowledge, skills and competence to undertake the brief at hand;
  - (d) diligence in the conduct of the brief;
  - (e) client care; and
  - (f) professional indemnity cover.
44. Rationale for the Standard: A client is entitled to assume that, by virtue of being licensed to practice law, the Advocate has the knowledge, skills and competence required to deal adequately with a client's brief. Competence involves possession of an understanding of legal principles as well as adequate knowledge of the practice and procedures by which legal principles can be effectively applied. Competence also requires effective client care and office administration and management strategies.
45. Constitutional Basis for the Standard: Article 46(1) of the Constitution confers on consumers the right to services of reasonable quality. Clients, as consumers of legal services, therefore have a constitutional right to quality legal services. Thus advocates owe to their clients a constitutional duty to provide quality legal services.

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46. Qualification to practice law: Section 13 of the Advocates Act, the Advocates (Degree Qualifications) Regulations, and the Advocates (Admission) Regulations prescribe the professional and academic qualifications required for admission as an Advocate.
47. Knowledge, skills and competence: The Advocates (Continuing Professional Development) Rules LN 43/2014 requires mandatory attendance of continuing professional development programmes on an annual basis. These statutory requirements are designed to ensure that the Advocate is qualified and has the knowledge, skills and competence required to deal adequately with a client's brief.
48. Rule 11 of the Advocates (Continuing Professional Development) Rules LN 43/2014 expressly provides that failure to comply with the Rules on continuing professional development is an act of professional misconduct.
49. Rationale for the Standard: Whereas, following admission, an Advocate is assumed to be legally qualified to handle any brief, on account of limited experience and the specialist nature of certain kinds of legal issues, an Advocate may well not have the competence to undertake specific kinds of work. It is not good professional practice for an Advocate to accept instructions in respect to which he/she has no capacity to carry out competently on account of either the specialist or complex nature of the brief or the experience of the Advocate.
50. When approached in respect to work which the Advocate cannot undertake competently the Advocate should inform the client of the fact that the

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Advocate cannot on his/her own carry it out and, in the event that the client chooses to proceed and instruct the Advocate, the Advocate should, following discussions with the client, make appropriate arrangements for the work to be undertaken by, or in association with, an Advocate with the appropriate skills and capacity to competently carry out the work.

51. As a general principle an Advocate should always advise the client of the need for specialist input where the matter is complex or relates to a specialist area of legal practice. Failure to do so poses the risk of adversely affecting the client's interests and, should that lead to a complaint from an aggrieved client, the Advocate risks discipline for professional misconduct. In addition the Advocate risks liability for professional negligence.
52. If an Advocate engages or involves another Advocate in the handling of the matter the responsibility for paying the other Advocate's fees, and the likely amount of fees or the basis for charging the fees, shall be agreed beforehand with the client. In the absence of an agreement with the client that the client will be directly responsible for paying the fees to the other Advocate, the instructing Advocate remains responsible for the payment of the fees.
53. Diligence: The Advocate has an obligation to carry out the work given to him by a client in a diligent and timely manner. Once he/she accepts instructions it is professional misconduct to neglect the brief or withdraw from acting without proper notice to the client and, until the client has either been given an adequate opportunity to instruct another Advocate or personally take his/her file, the Advocate must continue diligently protecting the client's interests.

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54. Integral to the competent provision of services to a client is proper office management and administration systems. The Advocate is under an obligation to invest in the necessary financial, technical and administrative resources required to establish, maintain and operate an office or offices which enable the Advocate to serve the client competently and diligently.
55. The Law Society of Kenya therefore expects the Advocate, as a condition to being issued with an annual practicing certificate, to maintain a physical address from which he or she operates. Failure to establish an appropriate office or put in place the necessary office management and administrative systems to enable the Advocate serve clients diligently which undermines quality service to the client can lead to a finding of professional misconduct.
56. The nature and appropriateness of the office and the management systems to be established will depend on the kind and setting of the Advocate's practice. However where the LSK has issued guidance on the establishment, operation and closure (or winding up) of Advocate's office or practice, the Advocate will be expected to take account of and give effect to such guidance and failure to do so will be a ground for disciplinary action.
57. Client care: The Advocate is under an obligation to put in place a client care system to enable the Advocate manage the client diligently. Failure to put in place and operate a client care system can lead to a finding of professional misconduct.
58. Examples of practices which might lead to disciplinary action for professional misconduct include:

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- (a) Failure to keep the client periodically informed about developments affecting the client's matter;
  - (b) Treating the client discourteously or disrespectfully by, for example, showing rudeness or routinely failing to keep appointments with the client without prior information to the client;
  - (c) Writing letters that are abusive, offensive or rude or totally inconsistent with the proper tone of professional communication from an Advocate;
  - (d) Failing to take action on a client's matter when such action is needed for the effective management of the case (e.g. failing, without justification, to prosecute a case for more than one year as required by the rules);
  - (e) Manifestly poor quality work or a pattern of poor quality work with obvious errors of fact and or law, such as poorly drafted pleadings;
  - (f) Failure to maintain a system for addressing and remedying client grievances.

59. As a consumer of services in a competitive market, the client has the right to use an Advocate of the client's choice. Therefore the Advocate should refrain from obstructing or frustrating a client who is seeking to exercise this right. A client may, if need be, withdraw instructions and move onto another Advocate. It is the Advocate's responsibility to facilitate the client's exercise of this choice.

60. Upon discharge or withdrawal from acting in a matter the Advocate has an obligation to:

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- (a) Deliver to the client all papers and property belonging to the client, subject to any right of lien that the Advocate may have on account of unpaid fees;
  - (b) Provide to the client all material information about the case;
  - (c) Account for all funds of the client and refund any remuneration not earned by virtue of the services rendered; and
  - (d) Cooperate with successor Advocates to enable them take over the case or transaction.

61. Before accepting engagement the successor Advocate should be satisfied that the former Advocate approves or has withdrawn or been discharged by the client. It is good practice for the successor Advocate to urge the client to settle or secure the account owed to the former Advocate before accepting instructions. But if a trial or hearing is imminent or the client would otherwise be prejudiced the existence of an outstanding account should not stand in the way of a successor Advocate acting for the client.

62. Professional Indemnity Cover: The Advocates (Professional Indemnity) Regulations, 2004 imposed a requirement for a professional indemnity cover to be purchased by every Advocate practicing on his own behalf. The cover is to be used in the compensation of clients for loss or damage from claims in respect of any civil liability or breach of trust by the Advocate or his employees. The amount of the cover has been enhanced since the regulations first introduced the requirement and will most likely continue to rise.

63. Under the rules no practicing certificate shall be issued to an Advocate without evidence of the required amount of professional indemnity insurance cover. Additionally, an Advocate who proceeds to engage in practice without

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maintaining the required level of professional indemnity insurance can face disciplinary action for professional misconduct.

64. It is good practice and prudent for an Advocate to secure and maintain adequate insurance cover against claims based on professional negligence. Adequacy will vary from case to case and depends on the nature of briefs handled by the Advocate. Clients may also have their own requirements regarding the scope of professional indemnity cover the Advocate needs to secure and the rules recognize the right of the Advocate and client to reach agreement on this issue. However the Advocate may not reach an agreement whose effect is to enable the Advocate reduce the cover below the prescribed minimum.

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## 4. Professional Fees

65. SOPPEC-4: *The practice of undercutting, that is, charging less than the scale fees for professional services rendered constitutes professional misconduct. Similarly, unjustifiably high fees which is not commensurate with the professional services rendered constitutes professional misconduct.*
66. Statutory basis for the Standard: Fees which may be charged by Advocates for professional services are regulated and prescribed in rules promulgated by the Chief Justice from time to time as the Advocates (Remuneration) Order. Rule 3 of the Advocates (Practice) Rules states that “no Advocates may hold himself out or allow himself to be held out directly or indirectly as being prepared to do professional business at less than the scales laid down by the Advocates (Remuneration) Order for the time being in force.”
67. Rationale for the Standard: Misunderstanding about fees and failure to adhere to the provisions of the Advocates (Remuneration) Order is a common cause of complaints against Advocates. The perception by a client that the fees charged are inflated or that the Advocate seeks to take advantage of the client will undermine the client’s confidence in the professionalism and integrity of Advocate. If such undercutting widespread it poses the risk of bringing the legal profession into disrepute and undermining the administration of justice.
68. It is good professional practice to always make clear the basis on which fees will be charged and the likely amount of fees involved in handling a matter. This should be done in the discussion held with the client at the time instructions are being given. Where no agreement is reached with the client regarding fees, the Advocate should not accept instructions or, if instructions are already



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issued, the Advocate should not commence the work until such agreement is reached.

69. It is good professional practice for Advocates to always encourage clients to issue written instructions before the Advocate's engagement commences. The written instructions may take the form of either a letter of instructions issued by the client to the Advocate or a memorandum of agreement between the Advocate and the client. In the case of the memorandum of agreement the memorandum should be signed by both the client and the Advocate. The letter or agreement should clearly define the nature and scope of the engagement and the understanding between the parties as regards fees, either clearly stating the amount of fees to be charged or the basis on which fees will be charged.
70. It is professional misconduct for an Advocate to undercut by charging fees below the scale fees stipulated in the Advocates (Remuneration) Order. This prohibition means that an Advocate who participates in a tender process by bidding for work may not, in his/her financial bid quote fees below the scale fees. Neither may an Advocate enter into an arrangement with a client for discounts based on volume, as a consideration for being retained to undertake the work or on some other basis, if such retainer would breach the Remuneration Order.
71. In cases of indigence or hardship faced by a client, or where the matter in issue is a public benefit matter or the organization in question pursues charitable objectives Advocates are encouraged agree to provide legal services on a *pro bono* basis, in which case no fees are chargeable. Unless the *pro bono* services are being rendered to a registered charity with VAT

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exempt status the Advocate may find that, despite having rendered the services *pro bono*, value added tax remains payable.

72. Where however, instead of undertaking the work *pro bono*, the Advocate wishes to reduce the amount of fees chargeable below the scale fees on account of hardship or poverty of the client or, in the case of a client which is a charitable organisation, as a contribution to the charitable cause being advanced by the client, the prior written permission of the regulatory bodies (i.e. the LSK) shall be obtained.
73. Where, however, the Law Society has issued guidance on the charging or waiver of fees for work undertaken *pro bono* or at a discount the Advocate shall take account of and give effect to such guidance. Failure to do so will be a ground for disciplinary action.
74. Overcharging: The fees prescribed in the Advocates (Remuneration) Order are minimum scale fees, not a cap. The Remuneration Order also allows fees to be based on agreement between the Advocate and the client. However to inflate fees unjustifiably, particularly in respect of vulnerable clients, can undermine confidence in the professionalism and integrity of the Advocate. It can also undermine confidence in the legal profession.
75. Examples of overcharging include:
- (a) Inflating fees and or disbursements incurred;
  - (b) Misleading the client as to the scale fees;
  - (c) Generating unnecessary work as a basis for extra fees;
  - (d) Misrepresent the amount or complexity of the work involved;

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(e) Claiming that the work took more time to carry out than it did and so on.

76. Charging a fee that cannot be justified given the nature and scope of the brief or that is so disproportionate to the services rendered as to introduce an element of fraud or dishonesty or undue profit may amount to professional misconduct and expose the Advocate to disciplinary action. Unjustifiably overcharging a client is to be discouraged, even if the client has agreed to the fee proposal, since in many instances the client looks to the Advocate to advise the client properly on the fees chargeable for the brief.
77. In dealing with a complaint regarding overcharging or the rendering of inadequate services the regulatory bodies will give due consideration to the contents of the engagement letter or memorandum of agreement. It is the Advocate's responsibility to ensure that such written instructions or memorandum of agreement is in place. The failure to ensure that a letter of instructions is issued by the client or a memorandum of agreement executed will be considered as *prima facie* evidence of professional misconduct.
78. Contingent fees: The rules governing the practice of law in Kenya do not permit a "contingent fee" arrangement, under which the Advocate's fee or a portion of it is pegged on the outcome of the case. The law also prohibits champerty, which is an agreement to divide litigation proceeds between the owner of the litigated claim and a third party to the law suit who supports or helps to enforce the claim. Champerty is prohibited in any case but as regards Advocates it is prohibited also because an Advocate who has a financial interest in the outcome of the case is unlikely to provide objective advise and disinterested service to the client.

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79. The prohibition of champerty extends to any arrangement under which the Advocate acquires a financial or other property interest in the subject matter of the dispute or in the outcome of the case. The reason for the prohibition is the risk of conflict arising which would undermine the Advocate's ability to render objective legal advice and services to the client. Advocates should therefore ordinarily avoid the temptation, and resist requests from clients, to finance a client's litigation in the expectation that upon the success of the claim the Advocate will recover his/her financing costs from the proceeds of the settlement.
80. Advocates should also avoid a situation in which the Advocate effectively becomes creditor of the client by financing the litigation or the pursuit of a claim on the understanding that the Advocate will recover the money advanced from the proceeds of the settlement. Where there are justifiable reasons, such as indigence, for pre-financing a client's litigation the Advocate should, before entering into an agreement with the client on those terms, seek the approval of the Law Society and, where the Law Society has issued guidance on the issue, comply with such guidance. In all cases, such agreements should be in writing.
81. The Advocate should also avoid entering into an arrangement under which the client settles legal fees "in kind" through for instances the rendering by the client of services to the Advocate or the transfer by the client to the Advocate of property in settlement of legal fees. Such arrangements involve various legal and technical complications including how to value the services or property provided by the client, the payment of income and value added tax by the Advocate and the risk that the Advocate-client relationship gives

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way to a transferee-transferor relationship with all its attendant complications.

82. Commission payments and “finder’s fees”: The rule prohibiting sharing profits with an unqualified person extends to the practice of paying a commission to, or sharing fees with, another person for introducing work or referring clients (referred to as “finder’s fees”). It also promotes unethical conduct and corrupt practices which undermine the standing of the legal profession. It constitutes professional misconduct and will be expose the Advocate to disciplinary action.

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## 5. Client's property

83. SOPPEC-5: *The Advocate shall not appropriate or convert any funds of the client held in trust or otherwise under the Advocate's control without the express authority of the client. Any unauthorized appropriation or conversion shall be treated as professional misconduct.*
84. Statutory basis for the Standard: The Advocate is a trustee of client's funds and other property in his possession or under his control. The Advocate therefore has responsibilities of a fiduciary towards his/her client. Additionally the Advocates (Accounts) Rules, the Advocates (Accountants Certificates) Rules and the Advocates (Deposit Interest) Rules impose on the Advocate statutory responsibilities in regard to client's funds and other property in the Advocate's possession.
85. The fiduciary duty and rules also apply to client's property. "Property" includes securities such as title deeds, charge documents, share certificates, wills, files, original documents and so on. The Advocate has a duty to maintain a record of client's property in the Advocate's custody to facilitate proper accounting. The Advocate should keep client's property out of site and or reach of those not entitled to see them. Subject to the right of lien the Advocate should promptly return the property to the client upon request or at the conclusion of the Advocate's engagement.
86. The pillars of the Advocate's fiduciary and statutory duties towards the client are to:
- (a) Keep client's funds separate from the Advocate's own monies and avoid co-mingling of funds;

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- (b) Faithfully account to the client for any use made of the funds on the client's instructions for disbursements and other purposes;
  - (c) Promptly pay out to the client any money belonging to the client; and
  - (d) Safeguard other client's property in his/her possession to prevent loss, damage or unauthorized access and or use.

87. Rationale for the Standard: Complaints arising from misappropriation and or conversion of client's funds constitutes the majority of complaints for professional misconduct lodged against Advocates. Often these complaints are categorized as "failure to account" or "withholding of funds" but the underlying problem is misappropriation or conversion of funds. Not only does such conduct undermine confidence in the legal profession as a whole but it undermines the administration of justice.

88. Improper handling of client's funds contrary to the Standard and good practice will be dealt with as professional misconduct. An Advocate has an obligation to promptly transfer to the client or third person funds received or being held on behalf of the client or third person. An Advocate may **not** use a client's funds or property to set off payment of outstanding fees or expenses except with the prior agreement of the client. Refusal or other delay in transferring funds to the client or use of the funds for the Advocate's own purposes amounts to misappropriation or conversion, both of which are criminal offences and amount to professional misconduct.

89. Other acts which exposes the Advocate to the risk of disciplinary actions for professional misconduct include:

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- (a) Issuing a cheque drawn on Client's Account which is dishonoured (i.e. returned unpaid) for lack of funds;
  - (b) Failure to produce an Accountant's Certificate (or statutory declaration in lieu thereof) pursuant to the Accountant's (Certificate) Rules;
  - (c) Failure to maintain a separate client's account and evidence of co-mingling of funds or use of client's funds to finance office, business or personal expenses;
  - (d) Trading with client's money, through for instance delaying payment of the funds to the client to enable the Advocate earn interest on the money contrary to the Advocate's (Deposit Interest) Rules.
90. Information about client's funds: The protection accorded to client information and communication extends to information about client's funds. This means that as a general rule an Advocate may legitimately not reveal information about client's funds or other property to third parties without the client's authorization. This places the Advocate's client account at risk of being used, wittingly or unwittingly, as a cover for money laundering or other unlawful objectives.
91. An Advocate who knowingly aids or abets money laundering and other financial crimes is guilty of professional misconduct and risks losing the protection accorded to the Advocate as regards client information. The Advocate should guard against being used to "provide cover" for illegal activities and has to walk a thin line between legitimate safeguarding the client's legitimate interests and being an accessory to criminal activities. In operating the client's account and handling client's funds the Advocate shall take cognizance of applicable legal provisions and directives arising from or



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issued under the Proceeds of Crime and Anti-money Laundering Act, or similar legislation.

92. It is good practice for the Advocate to put in place systems and measures to safeguard against the use of the client account for money laundering or other illegal transactions. Such “*Know Your Client*” measures include:

- (a) Ascertaining the identity and authority of the persons transferring funds into the Advocate’s account and the legitimacy and purpose of the funds transfer;
- (b) Maintaining complete records of funds received from clients and third parties;
- (c) Where there is reason to do so, making appropriate inquiries of the client and third parties as to the source or origin of the funds;
- (d) Declining instructions where there is reasonable cause for concern that acting on the client’s instructions will lead to possible contravention of the law against money laundering.

93. Client records: The Advocate’s duty to maintain client records, including files and other client documents requires the Advocate to establish and operate a secure filing and archiving system so that the records do not get lost or misplaced or fall into the hands of unauthorized persons. There is no statutory provision as to the period for which the Advocate must maintain client records before destroying them. In view of the cost of archiving closed files, the Advocate cannot be expected to store records indefinitely.

94. In deciding on the appropriate time frame for keeping files and other records, the Advocate is advised to take account of the rules arising under

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the law on statutory limitations for filing proceedings, on maintaining certain records, for instance tax records, and on the administration of estates, among other considerations. If the Advocate does decide to destroy records reasonable efforts should be made to inform the client, personal representatives or successors to come and take the files before they are destroyed.

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## 6. Conflict of interest:

95. SOPPEC–6: *The Advocate shall not advise or represent both sides of a dispute and shall not act or continue to act in a matter when there is a conflicting interest, unless he/she makes adequate disclosure to both clients and obtains their consent.*
96. A conflicting interest is an interest which gives rise to substantial risk that the Advocate’s representation of the client will be materially and adversely affected by the Advocate’s own interests or by the Advocate’s duties to another current client, former client or a third person.
97. Rationale for the Standard: The Advocate’s ability to represent the client may be materially and adversely affected unless the Advocate’s judgment and freedom of action are as free as possible from compromising influences and the relationship between the Advocate and the client is not materially impaired by the Advocate acting against the client in any other matter.
98. Maintaining loyalty to clients promotes trust and confidence in the Advocate. Therefore, as a general rule, an Advocate should not knowingly assume or remain in a position in which a client’s interests conflict with the interests of the Advocate, the firm’s or another client. The Advocate should not represent a client if the representation involves a conflict of interest.
99. Situations in which a conflict of interest might arise include:
- (a) Where the interests of one client are directly adverse to those of another client being represented by the Advocate or the firm, for

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instance in situations where the representation involves the assertion of a claim by one client against another client;

(b) Where the nature or scope of representation of one client will be materially limited by the Advocate's responsibilities to another client, a former client, a third person or by the personal interests of the Advocate.

(c) Where in the course of representing a client there is a risk of using, wittingly or unwittingly, information obtained from a current or former client to the disadvantage of that other client or former client.

100. Additionally, a client is entitled to expect independent, unbiased and honest advice from the Advocate. Circumstances in which a Advocate's independence may be at risk of being compromised include:

- a. Getting involved in a business transaction with the client, such as a debtor- creditor relationship;
- b. Acquiring an ownership, possessory or security interest in a property which is adverse to the client's interest in the same property;
- c. Acquiring a financial interest in the subject matter of the case that the Advocate is handling; or
- d. Having a personal or professional relationship with the adverse party or a close associate or family member of the adverse party.

101. The Standard as regards the need for professional independence applies to an Advocate in private practice as it does to in-house counsel, notwithstanding that in the latter case the advice is rendered to the employer. The objectivity and detachment of in-house counsel may however be compromised, understandably so, by the employer-employee relationship.

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102. The Advocate is required to make a full and frank disclosure to the client when it becomes clear to the Advocate that there is a conflict of interest. This requirement is to enable the client make an informed decision about whether to have the Advocate act despite the existence or possibility of a conflicting interest. The Advocate should however nevertheless guard against acting for more than one client where, despite the fact that all parties concerned consent, it is clear that a contentious issue may arise between them or that their interests, rights or obligations will diverge as the matter progresses.

103. Further an Advocate who has acted for a client should not, in the same or a related matter, act against the client or otherwise act against the client where the Advocate might be at risk of using against the client information previously obtained from the client. It is not however improper for the Advocate to act against the former client in a fresh and independent matter wholly unrelated to any work the Advocate has previously done for that person.

104. The Advocate may act in a matter which is adverse to the interests of a current client provided that the matter is unrelated to any matter in which the Advocate is acting for the current client and no conflicting interest is present.

105. Accepting instructions and proceeding to act without making a disclosure of the existence of a conflict of interest amounts to professional misconduct. It would be good practice for the Advocate to ensure that the disclosure made, and the client's decision that the Advocate should continue to act despite the existence of a conflict of interest, are both in writing.

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## 7. Confidentiality of Advocate-client communication:

106. SOPPEC-7: *Communication between the Advocate and client is protected by the rule on confidentiality of Advocate-client communication. Consequently, the Advocate has a duty to keep confidential the information received from, and advice given to, the client. Unauthorized disclosure of client confidential information amounts to professional misconduct.*

107. Rationale for the Standard: The protection accorded to communication between the Advocate and client and advice given by the Advocate to the client through the doctrine of professional privilege is a crucial element of public trust and confidence in the administration of justice and the independence of the legal profession. The Advocate cannot render effective professional service to the client unless there is full and unreserved communication between them. The client is entitled to assume that, without his express consent or unless otherwise required by law, matters disclosed to or discussed with the Advocate will be held secret and confidential.

108. Statutory basis for the Standard: Section 134(1) of the Evidence Act prohibits advocates from disclosing privileged advocate-client communication. The privilege covers contents and conditions of documents within the Advocate's knowledge as well as advice rendered by the Advocate to the client. Section 134(2) of the Evidence Act extends the obligation for non-disclosure after the employment of the Advocate has ceased. Under section 134(1) an Advocate is only permitted to disclose privileged communication with the express consent of the Client. However, section 134 (1)(a) and (b) does not protect communication made in furtherance of an illegal purpose as well as observation by the advocate on commission of crime or fraud from the time

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of his employment as the client's Advocate. Section 135 of the Evidence Act extends the duty for non-disclosure of privileged information to the clerks and servants of the Advocate.

109. Protection of Advocate-client communication is comprised of the doctrine of legal professional privilege and Advocate – client confidentiality.

110. Legal professional privilege is evidentiary privilege that protects an Advocate from being compelled to disclose certain communications between the Advocate and client in a judicial or other proceeding where the Advocate may be called as a witness. Legal professional privilege acts to protect the Advocate. It is not designed for the benefit of the Advocate but for the benefit of the client and public interest in ensuring access to legal services.

111. The duty of confidentiality may be waived by the client and therefore, if a situation arises in which the Advocate is called upon to disclose such information, and it is not a situation in which the duty has been exempted or qualified by law, before making the disclosure, the Advocate should seek the consent of the client preferably in writing.

112. The Standard on confidentiality of Advocate-client communication, on the other hand, covers all communication between the Advocate and the client relating to the advice given to the client and representation of the client by the Advocate. As a general principle the Advocate should not disclose information which is protected by the rule relating to client confidentiality. The scope of the principle of confidentiality is thus greater than that of legal professional privilege.

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113. The Advocate's obligation of confidentiality and professional secrecy extends beyond the period of subsistence of the Advocate-client relationship: indeed it has no time limit. The Advocate has to ensure that client confidential information remains confidential even if the client withdraws instructions or terminates the engagement as well as following the conclusion of the transaction or brief in question.

114. The obligation to keep Advocate client communication confidential also applies to the support staff in the Advocate's office. The Advocate has a duty to ensure that such staff members maintain the obligation of confidentiality and professional secrecy. In this respect the general rule is that any information known by the Advocate is deemed to be known by the entire law firm.

115. The Advocate's duty to safeguard client confidential information requires that the Advocate puts in place measures and systems for data storage and protection. This includes electronic communications and data stored in computers. Thus, if due to inadequate protective measures, client information inadvertently comes into the hands of third parties, the Advocate could be guilty of professional misconduct, and in the event that the client suffers loss and damage as a result of such inadvertent disclosure the Advocate may be exposed to claims of professional negligence.

116. Client information is for the benefit of the client, not the Advocate. Therefore the Advocate should not make use of information made available to the Advocate by a client to advance the Advocate's private or business interests without the consent of the client. By way of example an Advocate writing a



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book, such as an autobiography, shall not to make unauthorized use of confidential information obtained from the client.

117. In the same vein the Advocate may not, without the consent of the client, provide information on work undertaken for a client to support a tender submitted to a prospective client or other solicitation for work. The general principle is that the Advocate should not make unauthorised use of information which is protected by the rule relating to client confidentiality and should only disclose information which is publicly available. Prior to providing such information to support a tender the Advocate shall seek the client's consent. The same caution should be exercised in relation to material published in the law firm's profile, brochures, websites and other publicity material.

118. The Advocate should avoid indiscreet conversations or gossip which might reveal confidential information about a client or a client's matter. Even in situations where the issue is public knowledge the Advocate should guard against participating in or commenting upon speculation concerning the client's affairs or business. The information disclosed in such informal settings, even if it is limited to not more than the identity of a client or the fact that a particular individual has consulted the Advocate, could result in prejudice to the client. Any commentary by the Advocate who is acting for a client will be seen by those listening as validation of the speculation.

119. Apart from the risk of prejudice to the client arising from indiscreet conversations by the Advocate, respect of the listener for the Advocate concerned and the listener's regard for the Advocate's integrity and trustworthiness will probably be lessened. The need to exercise care and

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avoid indiscreet conversation applies with equal force to communication on social media. A breach of client confidentiality through indiscreet conversations, even if inadvertent, amounts to professional misconduct.

120.Exceptions: There are situations in which the principles of confidentiality and professional secrecy of Advocate-client communications do not apply.

121.Reference has been made to the Advocate's statutory and professional duty to safeguard against the use of the Advocate's client account for money laundering or other unlawful financial transactions. Consequently, the Advocate cannot claim the protection of confidentiality when assisting and abetting the unlawful conduct of their clients.

122.The protection afforded to Advocate-client communications may also be qualified, for instance, if revealing the information is necessary to prevent the commission of a crime in furtherance of which the client has used or is using the Advocate's services. Indeed situations may arise in which the Advocate has a positive obligation to report to the authorities the risk of a crime being committed, for instance where there is an impending threat of a crime, such as a terrorist attack, being committed. The Advocate will have to exercise professional judgement in deciding whether, in the particular case, disclosure is justified.

123.Disclosure may also be justified in order to establish or collect a fee or to defend the Advocate against any allegations of professional misconduct but only to the extent necessary for such purpose.

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## 8. The Advocate as client's representative

124. SOPPEC-8: *The Advocate is an officer of the court and therefore the Advocate shall discharge his/her duty to represent the client in adversarial proceedings and non-contentious proceedings by fair and honourable means and without illegality or subversion of the due processes of the law.*

125. Statutory basis for the Standard: Section 55 of the Advocates Act identifies advocates as officers of the court hence advocates are subject to the jurisdiction of the Court, the Advocates Complaints Commission and the Disciplinary Tribunal.

126. Rule 8 of the Advocates (Practice) Rules makes certain provisions for the Advocate's conduct in the context of adversarial litigation. The rule prohibits the Advocate from:

- (a) appearing as a witness before any court or tribunal in a matter in which he has reason to believe that he may be required as a witness to give evidence;
- (b) coaching or permitting the coaching of any witness in the evidence he will give before any court, tribunal or arbitrator; or
- (c) calling to give evidence before any court, tribunal or arbitrator any witness whom he knows to have been coached in evidence without first informing the court, tribunal or arbitrator of the full circumstances.

127. In adversarial proceedings the Advocate's function as advocate is necessarily partisan. The Advocate does not have an obligation to assist an adversary or advance matters which undermine the client's case. But as a member of the

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legal profession and an officer of the court the Advocate has a duty to uphold the rule of law and refrain from subverting the course of justice. The Advocate must therefore be accurate, make a full disclosure and not mislead the court or tribunal, particularly when appearing before the court or tribunal *ex parte*.

128. The Advocate shall not resort to illegal or unlawful means or “*sharp practice*” to advance his client’s case. Examples of conduct which would amount to professional misconduct in the context of court or tribunal proceedings are:

- (a) Abuse the process of the tribunal by instituting or prosecuting proceedings or applications that, although legal in themselves, are motivated by malice on the part of the client or are brought solely for the purpose of injuring the other party or frustrating the processes of the court or arbitral tribunal.
- (b) Knowingly perverting or frustrating the course of justice by assisting or permitting the client to do something which the Advocate considers to be dishonest or unlawful, such as the procuring the disappearance of the court files or removal of documents from the court records;
- (c) Conducting a matter before a judicial officer when the Advocate or client has a business, personal or other relationship with such officer that gives rise to real or apparent pressure, influence or inducement affecting the impartiality of such judicial officer;
- (d) Attempting or allowing another person to attempt to influence the decision or actions of the judicial officer through corrupt or other unlawful means;
- (e) Knowingly deceiving or participating in the deception of a judicial officer or tribunal by offering false evidence, misrepresenting the facts or law, presenting or relying on a false affidavit or other evidence,

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suppressing relevant or assisting in any fraud, crime or illegal conduct;  
or

- (f) Dissuading a material witness from giving evidence or to falsify evidence.

129.If the client wishes to adopt a course of action which the Advocate considers to be a breach of the rule against abuse of the court process the Advocate has a duty to advise the client against it. If the client insists despite the Advocate's advise the Advocate's duty is to withdraw from acting.

130.At the same time the Advocate should never waive or abandon the client's rights without the client's informed consent. But, whenever a case can be settled amicably the Advocate should advise and encourage the client to do so rather than commence or continue legal proceedings.

131.The same principles of allegiance to the court and fidelity to the rule of law apply in the context of criminal proceedings. When defending an accused person the Advocate's duty is to put forward the accused person's defence notwithstanding the Advocate's private opinion as to its credibility or merits and vigorously seek to defend the client's right to a fair trial and a favourable outcome for the accused. But the advocate shall not base the accused's defence on assertions or claims which the Advocate knows to be false. Admissions made to the Advocate by the accused may impose limitations on the conduct of the defence, for example by ruling out an alibi defence.

132.The Advocate shall at all times demonstrate professional courtesy and respect to his/her colleagues when handling a matter or undertaking a

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transaction, including a non-contentious transaction. Professional courtesy dictates that the Advocate shall not approach or deal with an opposite party who is professionally represented except through or with the consent of that party's Advocate. To do so will be dealt with as professional misconduct.

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## 9. Professional undertakings:

133.SOPPEC–9: *The Advocate is under a duty to honour any professional undertaking given in the course of his/her practice in a timely manner. The obligation to honour a professional undertaking remains until the undertaking is performed, released or excused. To fail to honour an undertaking is professional misconduct.*

134.An undertaking is a formal promise whose effect is to make the person giving it responsible for the fulfillment of the obligations in respect to which it is given. An Advocate’s undertaking is a personal promise as well as a professional and legal obligation. It is based on the concept of the legal professional as an honourable profession and the expectation that an honorable person will honour his/her word. In legal practice professional undertakings are a standard method of mediating transactions. Without such undertakings there would be much difficulty and inconvenience suffered by clients.

135.Rationale for the Standard: The effectiveness of undertakings given by the Advocates depends on the confidence and belief that a party has that reliance can be placed on the undertaking. The Advocate’s failure to honour the undertaking undermines such confidence and is detrimental to the client’s interests. Moreover, a breach of a professional undertaking adversely affects the Advocate’s reputation as well as the reputation and trustworthiness of the legal profession as a whole and potentially can jeopardise legal transactions.

136.A professional undertaking is enforceable against the Advocate personally and therefore the Advocate must exercise care when giving and accepting

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an undertaking. Care requires that the Advocate observes the following principles in giving an undertaking:

- (a) Obtain the client's express authority to give it;
- (b) Give the undertaking in writing and, where given verbally, reduce it into writing as soon as reasonably practicable thereafter to avoid misunderstanding as regards the interpretation to be given to the undertaking;
- (c) Only give an undertaking which the Advocate has full control over the ability to fulfil;
- (d) Neither give nor accept an undertaking which, to the Advocate's knowledge, the Advocate giving the undertaking has no means with which to fulfil it;
- (e) Where the Advocate does not intend to accept personal responsibility for the fulfillment of the undertaking make this clear in the terms of the undertaking given;
- (f) Exercise diligence when accepting an undertaking from an Advocate. .

137. The LSK has issued guidance on professional undertakings and members are urged to make reference to the guidance in giving or accepting undertakings. In dealing with a complaint of professional misconduct arising from failure to honour a professional undertaking regard will be had to the extent to which the Advocate's conduct has complied with or departed from the guidance on professional undertaking issued by the Law Society of Kenya.



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## 10. The Advocate's use of Social Media

138. SOPPEC-10: *Inappropriate use of social media, particularly in a manner that undermines the standing and dignity of the legal profession, amounts to professional misconduct. Additionally, material and content drawn from social media sites are relevant and may be taken into account by the regulatory authorities in dealing with a charge of professional misconduct.*

139. Social media are web-based and mobile technologies that turn text communication into active dialogue. They principally take the form of on-line networking sites. Such sites create a context in which Advocates may form links to clients, judges and other members of the legal profession. This can create informality of relationships among members of the network which potentiality can undermine detachment and independence in the performance of their work and create the potential for conflict of interest to arise.

140. Social media provides a platform for short quick messages to be disseminated widely. It is often the case that comments posted online are spontaneous and less than guarded. Such comments, if not carefully thought out, can damage the professional standing of the Advocate, particularly when they express unconventional opinions or are controversial in nature. Social media also exposes the Advocate's personal and social life online and this might create an image of the Advocate which undermines the Advocate's, and more widely the legal profession's, standing in society.

141. Social media sites may also be used consciously or unconsciously to promote oneself and solicit for work. Therefore care needs to be taken not to breach the rules of the profession relating to advertising. Care should also be taken

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to ensure that comments made online are not intended to be relied on for legal advice as this might create exposure to professional liability claims for negligent professional advice. Advisement or solicitation for work on social media in breach of the rules governing advertisements amounts to professional misconduct.

142. Social media offers access to wide audiences in a cost effective manner and for this reason its use has grown dramatically in recent years including by and among professional persons. Social media can be used in a way which potentially can undermine the standing of the legal profession. Therefore in using social media Advocates should be mindful of the obligation to uphold the dignity and standing of the profession and should apply the same high standards of conduct to online activity as they do in their day to day professional life. At all times Advocates should refrain from commenting on a client's affairs on social media.

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## 11. The Advocate's outside interests

143. SOPPEC-11: *The Advocate who engages in another profession, business or occupation concurrently with the practice of law shall take care not to allow such outside interests to jeopardise the Advocate's professional integrity, independence or competence or the standing of the legal profession.*

144. "Outside interests" include activities connected with the practice of law, such as directorships on corporations as well as activities not connected to the practice of law such as business, politics, sports and the Advocate's social life.

145. Before engaging in other professions or businesses there are two tests to be satisfied: the profession or business must be an honourable one that does not detract from one's status as an Advocate and it must not be calculated to attract business to the Advocate unfairly, which would be a breach of the Advocate's Practice Rules.

146. Examples of activities which can be seen as calculated to attract business to the Advocate unfairly and are therefore improper are:

- (a) The Advocate becoming an active partner in a non legal firm dealing with insurance agencies;
- (b) The Advocates registering a limited liability company to undertake on their own account company work and the registration of companies; and
- (c) The Advocate joining or acting in association with an organization or person whose business is to make, support or prosecute claims as a result of death or personal injury in such circumstances that such person or organization solicits or receives any payment, gift or benefit in respect of such claims.

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147. The Advocate may only engage in outside interests which are compatible with the practice of law. These are activities which are honourable and do not detract from the status of the Advocate or the legal profession generally. Indeed the Advocate may be guilty of professional misconduct if he assumes an office or engages in an outside interest which is incompatible with the practice of law or dignity of the profession.

148. Where the outside interests might influence the Advocate's judgement or ability effectively to represent the client the Advocate should be governed by the rule relating to conflict of interest. Where the outside interest is not related to the provision of legal services, ethical considerations will usually not arise unless the Advocate's conduct brings the Advocate personally or the profession generally into disrepute.

149. Where the outside interests take the form of the Advocate holding a public office, the Advocate shall, in the discharge of his public duties, adhere to the standards of conduct as high as those applicable to the Advocate engaged in private practice. Because such Advocate is in the public eye, the legal profession can be more readily brought into disrepute by failure on the Advocate's part to observe the profession's standards of conduct.

150. Consequently, the Advocate holding a part time public office – for instance membership of a commission such as the Judicial Service Commission—shall not, during the time of such membership, accept or conduct any private legal business where the Advocate's duty to the client will or may conflict with the Advocate's official duty or where the Advocate private legal work may come into conflict or be seen to conflict with his official duties or position. The

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Advocate has a duty to avoid the risk or appearance of impropriety by for instance not handling a brief before a judicial officer where, on account of the Advocate's public office, there might be a reasonable apprehension that the judicial officer's independence might be compromised by the Advocate's appearance in the matter.

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## 12. Honesty and integrity:

151.SOPPEC-12: *The Advocate shall at times maintain the highest standards of honesty and integrity towards clients, the court, colleagues, all with whom the Advocate has professional dealings and the general public.*

152.Rationale for the Standard: Honesty and integrity are the hallmarks of a member of the legal profession. By adhering to the highest standards of honesty and integrity a member of the legal profession will promote trust in the profession. Dishonourable conduct on the part of the Advocate either in private or professional life will reflect adversely upon the Advocate, the integrity of the legal profession and the administration of justice.

153.As a general rule purely private or extra-professional activities of the Advocate that do not bring into question the integrity of the legal profession or the Advocate's professional integrity are not relevant considerations in determining professional misconduct. But if the conduct, whether within or outside the professional sphere, is such that knowledge of it would be likely to impair the client's trust in the Advocate as a professional advisor, then it would be justified to take disciplinary action for professional misconduct.

154.Conduct in the private sphere which might attract disciplinary action includes conviction for a criminal offence involving moral turpitude. Sexual harassment falls into this category as fraud, abuse of a position of trust and similar offences. Such conduct even, if not in the course of the practice of law, amount to professional misconduct.

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155. The elements which make up the concept of honesty and integrity include honesty and candour, personal dignity and respect for the law. Thus the Advocate:

- (a) Should not knowingly make a false statement of fact or law in the course of representing a client;
- (b) Should not fail to correct a false statement of material fact or law previously made by him/her; and
- (c) Must always demonstrate civility, personal dignity, candor, respect and courtesy in his or her dealings with others at all times, including those over whom he has authority and control, such as staff members and those serving as pupils in the Advocate's chambers.

156. The Standard on honesty and integrity also requires that an Advocate may not use unlawful or unethical means to advance the client's case. Examples include obtaining or advising the client to obtain evidence through unlawful methods or suppressing or destroying or advising the client to suppress or destroy evidence or other information to the detriment of an opposing party or advising a client to achieve an objective through unlawful methods or conduct.

157. The Standard which imposes on the Advocate the duty of honesty and integrity extends to the conduct expected of the Advocate towards all persons with whom the Advocate comes into contact. At all times the Advocate should demonstrate courtesy and good faith. Any ill feeling that may exist between clients, particularly during litigation, should not be allowed to influence Advocates in their conduct towards each other or the

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parties. Personal animosity between Advocates involved in a matter may cloud their judgement and hinder the proper resolution of the matter.

158. The Standard also extends the Advocate's mode of dressing when in public. The Advocate is under a duty to dress modestly and in a manner that lends itself to the dignity of the legal profession. Where an issue arises regarding the appropriateness of the dressing of the Advocate, whether male or female, regard shall be had to the extent of compliance by the Advocate with the Advocates Dress Code issued by the Law Society of Kenya dated 21<sup>st</sup> January 2013 or any amendment or replacement thereof. Repeated failure to adhere to the dress code without adequate reason can undermine the standing of the Advocate in the eyes of the public.

159. The Standard also extends to the Advocates management of his/her financial affairs, whether personal or business finances. The Advocate has a professional duty to meet financial obligations incurred or assumed in the course of practice or in private life. A pattern of neglect to discharge debts and other financial obligations undermines the standing of the Advocate and the dignity of the profession. Such a pattern can also attract disciplinary action for professional misconduct.



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## PART V: REFERENCES

160. Guidance issued by the LSK comprise:

- (a) The Law Society of Kenya Digest of professional Conduct and Etiquette (1982)
- (b) Law Society Conditions of Sale and Agreement for Sale Layout (2015)
- (c) Guidance on professional Undertakings
- (d) The Advocates Dress Code

161. The statutory rules which currently govern professional conduct are:

- (a) The Advocates (Remuneration) Order LN 35 of 2014
- (b) The Advocates (Accounts) Rules LN No 137/1966 and No 111/1977
- (c) The Advocates (Practice) Rules LN No 19/1967 and No 223 of 1984
- (d) The Advocates (Deposit Interest) Rules LN No 19 of 1967
- (e) The Advocates (Accountants Certificate) Rules, 1967
- (f) The Advocates (Practising Certificate)(Fees) Rules, 2003
- (g) Advocates (Professional Indemnity) Regulations, 2004
- (h) The Advocates (Continuing professional Development) Rules No 43 of 2014
- (i) The Advocates (Marketing and Advertising) Rules LN No 42 of 2014

162. The international and comparative material from which the principles and Standards have been drawn comprise:

- (a) IBA International principles on Conduct for the Legal Profession (May 2011)

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- (b) IBA International principles on Social media Conduct for the Legal Profession, 24 May 2014
  - (c) Canadian Bar Association, Code of Professional Conduct
  - (d) SRA (Solicitors Regulation Authority) Code of professional Conduct 201



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